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In the Supreme Court of the United States

OCTOBER TERM, 1919

No. 107

PORT OF SEATTLE, *Appellant*,

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. P. DUTHIE & COMPANY, *Respondents*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellant

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PORT OF SEATTLE, *Appellant*,

vs.

OREGON & WASHINGTON RAILROAD COMPANY and J. F. DUTHIE & COMPANY, *Respondents*.

STATEMENT OF THE CASE.

I. QUESTION INVOLVED IN THIS CASE:

Upon the merits this case involves the conflicting claims of the State of Washington (represented in this case by the appellant Port of Seattle) and the respondent Oregon & Washington Railroad Company to rights in a strip of waterway area within the boundaries of the East Waterway in the harbor of Seattle and lying between the West boundary of the Waterway and the United States Government pier head line in the Waterway.

Respondent railroad company owns a tract of filled tideland abutting upon the waterway, deriving its title under deeds to its grantors from the State of Washington. Respondent railroad company claims that by virtue of these deeds and the legislation of the State of Washington in force at the time of the purchase of the property from the

State by its grantors it is entitled to access from its property abutting upon the waterway across the waterway area to deep water in the waterway and to construct wharves upon the waterway area out to the pier head line.

Appellant, Port of Seattle, as representative of the State of Washington, claims that the respondent railroad company has no right in the waterway area and claims the right under Chapter 168 of the Laws of Washington of 1913 to give permits for the construction of wharves and other structures upon such waterway area and by such permits to require payment of the revenue provided by the State act therefor to the State of Washington.

II. JURISDICTIONAL GROUNDS:

The jurisdiction of this Court of this appeal arises by virtue of the allegation in paragraph five of the answer of respondent railroad company that the provisions of Chapter 168 of the Laws of Washington of 1913 impair the obligation of its contract by which it acquired said lands contained in the deeds of the State and the legislation of the State of Washington then in force as to the waterway and sale of the lands which are described in paragraph three of the answer; and also the allegation

of respondent railroad company in paragraph six of its answer that the said Chapter 168 of the Laws of Washington of 1913 deprives respondent railroad company of its rights under the said deeds without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

See Respondents' Answer, Record, pp. 25, 26, 27.

The contention of respondent railroad company was sustained by the decree of the trial Court, it being adjudged in the decree that the provisions of the said Chapter 168 of the Laws of Washington of 1913 (by typographical error specified in the decree as Chapter 169) are invalid because the same are in conflict with Section 10, Article 1 of the Constitution of the United States and with the 14th Amendment to said Constitution. (Record, p. 38.)

By typographical error the act of 1913, the validity of which is involved in this case and which is in fact Chapter 168 of the Laws of Washington of 1913, is referred to in the decree, exceptions and assignments of error as Chapter 169, but the act in question is clearly identified by title in respondent railroad company's answer (Answer, paragraphs 4, 5 and 6, Record, pp. 26 and 27), by title in the opin-

ion of the Court deciding the case (Record, p. 37), and in the decree itself, which though giving the erroneous chapter number describes the subject and provisions of the act. (Record, p. 38.)

III. PHYSICAL FACTS:

East Waterway is an artificial waterway, excavated by the State through tide lands in the harbor of the City of Seattle, the tide lands belonging to the State at the time the waterway was created. The waterway connects with the waters of Puget Sound and constitutes an arm of the sea, and both the site of the waterway and the lands abutting upon both sides of the waterway were originally covered by the ebb and flow of the tide and all situated a very considerable distance from any upland. At the time the waterway was excavated under contract by the State the abutting tide lands, including those owned by respondent railroad company, were filled from the excavation made under said contract. All of East Waterway is within the limits of the Port District known as the Port of Seattle.

The waterway, when constructed by the State, was not excavated to a navigable depth for the full width of the platted waterway, but was excavated

with sloping banks. A bulkhead was constructed upon the boundary line of the waterway on a one-to-one slope from the original tide flat level to the top of the bulkhead and from the toe or foot of the bulkhead excavation was made on a slope of four feet vertical to one perpendicular down to a point which would give thirty feet depth at low tide, this full depth not being quite reached at what is now the Government pier head line, one hundred and twenty-five feet from the property line or boundary line of the waterway, the bed of the waterway being exposed at low tide to a point about thirty-six feet from the property line. (Record, pp. 47, 48 and 49; Exhibit 6, Record, p. 83.)

Respondent railroad company owns a portion of Block 393, Seattle Tide Lands, abutting upon the west side of the East Waterway, the exact description of its property being found in paragraph one of the complaint. (Record, p. 4. See also Plaintiff's Exhibit 1, Record, p. 79.)

The waterway was laid out pursuant to the waterway act hereinafter set forth, and the abutting tide lands were platted by the King County Board of Appraisers under the tide land act hereinafter set forth. (Appellant's Exhibit 3, Record p. 80.)

IV. STATE LEGISLATION MATERIAL TO THE CASE:

Chapter 168 *of the Laws of Washington of* 1913.

The act held by the trial Court to be invalid as impairing the obligation of respondent railroad company's contract and as taking its property without due process of law was entitled: "An Act permitting and regulating the use of waterway areas between the boundaries thereof and government pierhead lines, and providing for the disposition of receipts therefrom." It was approved March 22, 1913, and is here quoted in full, as follows:

> SECTION 1. Whenever, in any waterways created under the laws of the State of Washington, the government of the United States shall have established pierhead lines in said waterway at any distance from the boundaries thereof established by the State, no structure shall be allowed in the strip of waterway between the boundary and the nearest pierhead line except by the consent of the State land commissioner and upon plans approved and terms and conditions fixed by him, and then only for such period of use as shall be designated by him, but any permit shall not extend for a longer period than thirty (30) years; *provided*, however, that the owner of land abutting upon either side of any such waterway shall have the right, if application be made therefor within a period of ninety (90) days following the date when this act shall go into effect, to obtain such a permit for a

thirty (30) year term, and every permit obtained by virtue of the exercise of such right shall provide that the area described therein or such reasonable portion thereof as shall be designated by the State land commissioner, having in view the requirements of the business proposed to be carried on thereon, shall be improved upon plans approved by the State land commissioner, the construction of such improvement to be commenced within such time as may be fixed in each case by the State land commissioner, such time to be in no case less than two (2) years from the date of such permit, to be completed within such reasonable time thereafter as the State land commissioner shall fix in each case, any of which times so fixed may be thereafter extended by him; the character of which improvements may be changed either before or after completion with the consent of the State land commissioner, but in all cases where the abutting owner or one claiming under him had prior to February 22, 1913, built upon such area, his improvements shall be recognized and accepted as sufficient compliance with the requirements of this act so far as concerns the area covered thereby, and as to uncovered area such improvements shall be given the same consideration as in other cases, and every permit obtained by virtue of the exercise of such right shall further provide that the annual rental to be paid shall be a sum equal to two per cent. of the assessed valuation for the year preceding the date of such permit of an equal area of adjoining or abutting shore or tide lands, exclusive of improvements thereon, and where the adjoining or abutting strip of shore or tide lands is of less width than the harbor area, a value proportional to said width; *provided fur-*

ther, however, that the foregoing provision fixing the rate of rental shall not extend beyond December 31, 1928, but all rentals after that date shall be subject to be controlled and fixed in the manner and by the public authority or authorities then provided by law for the same: *provided further,* that it shall not be necessary for any public corporation proposing to make use of any such strip of waterway to acquire by condemnation or otherwise the right hereby granted relating thereto, but nothing herein contained shall be construed to deprive any party to any such condemnation proceeding of any damages to which he would have been entitled if this act had not been passed. The State land commissioner shall require of the holder of every permit under this act a bond with sufficient surety, to be approved by said commissioner, in such penalty, and not exceeding twice the amount of the annual rental, but in no case less than five hundred dollars, as may be prescribed by said commissioner, conditioned for the payment of the rental reserved in the permit at or prior to the time of payment therein specified, during the term of such permit or during such part thereof as said commissioner in his discretion shall require to be covered by such bond; and in case only a part of the term of such permit shall be covered thereby, said commissioner shall require another like bond, to be executed and delivered within three months and not less than one month prior to the expiration of the period covered by the previous bond, covering the remainder of the term of the permit, or such part thereof as said commissioner in his discretion shall require to be covered thereby. The said commissioner shall have power at any time to summon sureties upon any bond and to ex-

amine into the sufficiency thereof, and if he shall find the same to be insufficient he shall require the holder of the permit to file a new and sufficient bond within thirty days after receiving notice to do so, under penalty of cancellation of the permit; and the said commissioner shall have power upon sixty days' notice to cancel any permit for a substantial breach by the holder thereof of any of the conditions thereof, or for lack of a bond therewith as herein required. In any case where such waterway shall be within the territorial limits of a port district organized under the laws of the State of Washington, the duties herein assigned to the State land commissioner shall be exercised by the port commission of such port district, and in every case the rentals received shall be disposed of as follows: Seventy-five (75) per cent shall be paid by the State treasurer to the county treasurer of the county wherein such port district is situated, for the use of said port district, and twenty-five (25) per cent. into the State treasury, except that in cases where the port district itself shall have constructed or shall own structures or improvements situate upon such strip of waterway the entire rentals for such improved strip of waterway shall be paid directly to such county treasurer for the use of such port district. Nothing herein contained shall confer upon, create or recognize in any abutting owner any right or privilege in or to any strip of waterway abutting any street and between prolongations of the lines of such street, but the control of and the right to use such strip is hereby reserved to the State of Washington, except that in cases situate in a port district such control and use shall vest in such port district." (Laws of Washington of 1913, pp. 582, 583, 584 and 585.)

Waterway Acts.

East Waterway was laid out by the Harbor Line Commission of the State of Washington pursuant to "An Act to establish and define public ways for watercrafts across the tide flats within, in front of and for a mile either way from all incorporated cities and towns in the State of Washington," approved March 28, 1890. As this Act is important to an understanding of the case, we quote it in full, omitting the title and enacting clause:

> "Section 1. There shall be established one or more public ways across all of the tide-flats that are situated within or in front of any incorporated city or town, or within two miles either way from any incorporated city or town within the State of Washington.
>
> Sec. 2. The public ways provided for in section one of this act shall not be less than fifty nor more than one thousand feet wide, and shall commence at the outer or deep-water end, in not less than twenty feet of water at low tide, and shall extend inland across the state's tide-lands.
>
> Sec. 3. The public ways above provided for shall be so located as to include, as near as is practicable, within their bounds, all navigable streams running through the tide-flats in which they are located, and at such other places as may be necessary for the present or future convenience of commerce.
>
> Sec. 4. All public ways established under the provisions of this act shall be well defined by posts, not less than eight inches in diameter,

firmly set or driven in the ground, and of sufficient length so that they will project above the water, at high tide, not less than four feet, and such posts shall not be over four hundred feet apart; and all such public ways shall be correctly surveyed and connected, by metes and bounds, with the government surveys, or such other permanent land marks as will make a lasting record; and a correct plat of all public ways so established shall be made, one copy of which shall be filed with the Secretary of State, one copy with the commissioner of public lands of the State, one copy shall be kept in the office of the chairman of the board of harbor line commissioners, and each county shall be furnished with a correct plat of all such public ways established within its borders, and such plats shall be filed as city or town plats are filed, and become a part of the county records.

Sec. 5. All the public ways that may be established under the provisions of this act are, and shall forever be, reserved from sale or lease as public ways for water crafts.

Sec. 6. Where the words "tide-flats or tidelands" are used in this act, they shall be construed to mean all lands over which the tide ebbs and flows, and which is bare at low tide; and where the words ordinary water crafts are used, they shall be construed to mean boats, barges and other water crafts drawing two and one-half feet and over of water.

Sec. 7. The board of harbor line commissioners are hereby authorized and instructed to carry out the provisions of this act, and they shall begin operations as soon as practicable after the passage and approval of this act; and they are hereby authorized to employ such assistance and procure such material as may be

necessary to carry out the full intent and purpose of this act, and the compensation for the same shall be such reasonable amount as said commissioners may deem advisable.

Sec. 8. All bills incurred in carrying out the provisions of this act shall be audited and paid in the same manner as is provided in the act creating the harbor line commissioners, for the payment of bills incurred by them." (Laws of Washington, 1889 and 1890, pp. 731 and 732.)

In 1893 the Legislature passed an act entitled, "An Act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the State, granting rights-of-way across lands belonging to the State," approved March 9, 1893, the parts material to this case of which are as follows:

"Section 1. The commissioner of public lands of the State of Washington may, when in his judgment the interests of commerce would be subserved thereby, enter into contract with any person or persons, or incorporated companies doing business in the State of Washington, for the excavation of any waterway or waterways through any lands belonging to the State of Washington, or to any citizen or corporation of said State, and for the filling in and raising above high tide of any tide or shore lands belonging to the State of Washington, and upon the completion of such contract such person or persons or incorporated company shall become entitled to and shall have a lien, as in

this act provided, upon all tide and shore lands belonging to the State of Washington, adjacent to such waterway, and remaining unsold at the date of the approval of this act, that they may fill in and raise above high tide, and all purchasers of said tide and shore lands from the State of Washington shall take the same subject to said lien. * * * *

Sec. 2. Said contract with the commissioner of public lands shall specify the waterway or waterways proposed to be excavated, and the lands to be affected thereby, and shall be accompanied by a map of the locality or localities showing said waterway or waterways, and their relation to the harbor lines and reservations in front of the cities or towns where the same are located, and shall show the tide and shore lands to be filled in and raised above high tide, properly designated and subdivided as nearly in accordance with the existing subdivisions of abutting uplands as the proper location of said waterway or waterways will permit, and shall specify and exhibit the waterway or waterways proposed to be excavated as to their depth and width and extent. * * * *

Sec. 7. All contracts provided for herein shall specify the character of all bulkheads and other restraining works and be accompanied by drawings and specifications of the same, and the commissioner of public lands shall be the judge of the sufficiency thereof, and of the minimum depth to which any waterway shall be excavated, in order to make the same useful for the purposes of commerce and navigation.

Sec. 9. All waterways excavated through any tide or shore lands belonging to the State of Washington by virtue of the provisions of this act, so far as they run through said tide or shore lands, are hereby declared to be public waterways, free to all citizens upon equal terms,

and subject to the jurisdiction of the proper authorities, as provided by law. * * * *

Sec. 10. If the commissioner of public lands shall determine to let any contract for the excavation of a waterway, as hereinbefore provided, the tide land appraisers appointed in the county in which said tide lands lie, shall forthwith appraise the tide lands which it is proposed to fill in by the excavation of such waterway, at their actual value at the time of letting such contract, and the said lands so appraised shall never be disposed of by the state for less than such appraised value."

Laws of Washington of 1913, pp. 241 to 246.

HARBOR LINE COMMISSION ACT.

The Harbor Line Commission was provided for by "An Act to create a board of harbor line commissioners, prescribing their duties and compensation," passed by the Legislature of the State of Washington and approved March 28, 1890. Sections 1 and 3 of this act, being all that are material here, are as follows:

"Section 1. There is hereby created a board of harbor line commissioners, to consist of five disinterested persons to be appointed by the governor.

Sec. 3. The duties of the said harbor line commissioners shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or

within one mile thereof upon either side, and to perform all other duties provided and prescribed in article 15 of the constitution of the State of Washington, and all such other duties as the law may prescribe, and wherever and whenever said harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this state, they shall file the plat thereof in the office of the Secretary of State and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located, and from and after the filing of said plat, the harbor lines established as therein and thereon designated, and displayed, shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this state."

Laws of Washington of 1899 and 1890, p. 239.

The Constitutional provision referred to in Section 3 of the Harbor Line Commission Act is contained in Section 1 of Article XV of the Constitution, as follows:

"ARTICLE XV.

Section 1. Harbor Line Commission and Restraint on Disposition of Certain Tide Lands. —The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate

limits of any city, or within one mile thereof upon either side. The State shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the State, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."

1 Remington & Ballinger's Code of Washington, p. 111.

TIDE LAND ACT.

The same Legislature by an act approved March 26, 1890, entitled "An Act for the appraising and disposing of the tide and shore-lands belonging to the State of Washington" provided for the sale and appraisal of tide-lands, the material parts of which are as follows:

"Section 1. The tide and shore-lands in the State of Washington shall be appraised, and the same shall be disposed of by the commissioner of public lands as in this act provided, which are not by the constitution and laws of the State reserved from sale.

Sec. 2. There shall be a board of equalization, which shall be composed of five members, as follows: The secretary of state, the state

auditor, and three qualified electors, residents of counties of this State in which no tide-lands exist, who shall be appointed by the governor, and the same are hereby created a board of equalization and appeal as hereinafter provided, who shall serve for one year, or until their successors are appointed and qualified.

Sec. 3. The governor shall appoint, in each county of the State where shore and tide-lands exist, a board of appraisers, consisting of three disinterested resident freeholders, whose duty it shall be to examine and appraise the shore and tide-lands in their respective counties as hereinafter provided.

Sec. 4. For the purpose of survey and appraisal, the tide-lands of the State of Washington are hereby divided into three classes. The first class shall embrace all tide-lands situated within or in front of the corporate limits of any city, or within two miles thereof upon either side. * * * *

Sec. 5. Said board of appraisers shall meet at the county seat of their respective counties within thirty days after the location of the harbor lines in front of incorporated cities and towns, and, after taking an oath to support the constitution and the laws of Washington, and faithfully and impartially discharge their duties, shall organize by electing one of their number chairman and appointing a secretary. After the organization of the board as provided, they shall, within ninety days thereafter, examine, survey and appraise so much of the shore and tide-lands in their respective counties as lies within or in front of the corporate limits of any incorporated city or town, and within two miles thereof, upon either side, and thereafter, from time to time, such other lands as applica-

tion to purchase may render necessary, classifying the same and fixing the valuation of each lot, block, or tract separately, noting the improvements thereon and by whom claimed, and excluding the improvements from such valuation.

Sec. 6. Said board shall prepare plats showing all shore and tide-lands surveyed and appraised by them in their respective counties, on which shall be marked the location of all such lands, extending the lines of United States survey over the same, and shall prepare and keep in a well bound book a record of their proceedings, including a list of said shore and tide-lands and their appraisal of the same, which plat and book shall be in duplicate.

Sec. 7. When said board shall have discharged their duties as aforesaid, they shall deposit one copy of the plat and record as aforesaid with the county auditor in their respective counties, who shall file and safely keep the same in his office, and they shall deliver one copy of the plat and record to the state board of equalization.

Sec. 8. Any person, association or corporation entitled to purchase or hold real estate in the State of Washington, who shall desire to purchase under this act, may file with the commissioner of public lands an application to purchase any of the lands herein described, which application shall contain a description of the land applied for by metes and bounds. * * * *

Sec. 11. The owner or owners of any lands abutting, or fronting upon, or bounded by the shore of the Pacific Ocean, or any bay, harbor, sound, inlet, lake or watercourse shall have the right for sixty (60) days following the filing of the final appraisal of the tide-lands to purchase

all or any part of the tide-lands in front of the lands so owned: Provided, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide-lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid.

Laws of Washington, 1889 and 1890, p. 431 et seq.

V. HISTORY OF THE CASE AT BAR.

The case at bar is in the nature of a suit to quiet the State's title to the waterway and area as against the claims asserted by the respondent railroad company that it has the right of access from its private property abutting upon the East Waterway across the waterway area to deep water in the waterway and that it has the right to build wharves and other structures upon the waterway area extending from its property abutting upon the waterway out to the pier head line in the waterway, and to establish the State's right, through its representative, the Port Commission, to give permits for the construction upon the waterway area of wharves and other aids to navigation and to collect the revenue therefor provided by the law of 1913 above quoted authorizing the Port Commission so to do.

The Port of Seattle is a municipal corporation organized under the laws of the State of Washington, having, among other powers, (including that conferred by Chapter 168 of the Laws of Washington of 1913 quoted above) the power:

> "to improve navigable and non-navigable waters of the United States and the State of Washington within the port district; to create and improve for harbor purposes new waterways within the port district; to regulate and control all such waters and all natural or artificial waterways (waterways of commercial waterway districts excepted) within the limits of such port district so far as and to the full extent that this state can grant the same, and remove obstructions therefrom; to straighten, widen, deepen and otherwise improve any and all waters, watercourses, bays, lakes or streams, whether navigable or otherwise, flowing through or located within the boundaries of such port district."

Laws of Washington, 1911, Sec. 4, p. 419.

Laws of Washington, 1913, Sec. 4, p. 212.

Laws of Washington, 1917, Sec. 4, p. 499 and 500.

All the powers of a Port District are exercised through its Port Commission.

Laws of Washington, p. 415, Sec. 3.

The respondent Oregon & Washington Railroad Company is a corporation under the laws of the State of Oregon and the respondent J. F. Duthie &

Company is a corporation organized under the laws of the State of Washington and claims as lessee under respondent railroad company. For the purposes of this appeal appellant concedes that the real controversy is between appellant and respondent railroad company and that respondent J. F. Duthie & Company is only a nominal party.

The suit was brought in the Superior Court of the State of Washington for King County.

The complaint alleges the corporate character of plaintiff and defendants; the execution of a three year lease (copy attached to complaint) in 1916 by defendant railroad company to defendant J. F. Duthie & Company of a strip of tide land, part of Block 393, Seattle Tide Lands, owned by defendant railroad company; that it abuts on East Waterway; the establishment of the Government pier head line in the waterway 125 feet from the line of defendant railroad company's property and that defendant railroad company claims jurisdiction over the waterway area between the line of its property and the pier head line; that defendant railroad company has no right, title or interest in the waterway area and has made no application to plaintiff for a permit for the use of said waterway area and none has been

granted by plaintiff, and that claims of defendant railroad company and of J. F. Duthie & Company as its lessee to the waterway area are unfounded; the issuance of a permit to defendant J. F. Duthie & Company by plaintiff for the use of the waterway (copy attached to complaint). (Complaint, paragraphs I to V, Record, pp. 1, 2.)

Paragraph VI of the complaint was stricken by order of the trial Court (Record, pp. 23, 24) and is therefore omitted in this statement.

The complaint concludes with a prayer (among other things not urged on this appeal) for a decree quieting its title to the waterway area as against the defendants except so far as claimed under the permit to respondent J. F. Duthie & Company, and for general relief. (Record, p. 3.)

Respondent railroad company filed its petition and bond for the removal of the case to the United States District Court for the Western District of Washington, Northern Division, and it was accordingly removed.

After its removal appellant moved that the case be remanded, which motion was denied and such denial is hereinafter fully discussed in the argument as one of the grounds for relief on this appeal.

After the removal of the case and the striking of paragraph VI of the complaint respondent railroad company filed its answer admitting all of the allegations of the complaint except the part stricken and except the allegations that the waterway area therein described is within the jurisdiction of plaintiff and that the defendant railroad company has no right, title nor interest therein, which allegations were denied, and except the allegation of the complaint as to the permit to the defendant J. F. Duthie & Company which was not denied. (Record, p. 24.)

Respondent railroad company affirmatively alleged in its answer that the waterway was established under the Act of March 28, 1890, (giving its title and being the Waterway Act set forth above in full in this brief); the filing of the plat of the waterway and tide lands by the Board of Harbor Line Commissioners, and that the pier head line was located and shown upon said plat and adopted by the War Department of the United States; that the waterway was excavated by the State of Washington under the Act of March 9, 1893, (see the material parts of that Act printed in full above in this brief); that the abutting tide lands were platted by the

State into blocks and lots; the purchase by the defendant railroad company's grantors in good faith and for a valuable consideration of the tide lands described in the complaint, and the ownership of defendant railroad company of the same with its appurtenances; that plaintiff claims jurisdiction over the waterway area by virtue of the Act of March 22, 1913, (being Chapter 168 hereinbefore printed in full); and that said Act in fact provides for the leasing of waterway area and collection of rental therefor; that defendant railroad company acquired its tide lands in reliance upon the permanent continuance of the waterway created as alleged and that said tide lands are chiefly valuable because of their accessibility to East Waterway and because of the riparian and shore rights appurtenant thereto, and that the acts and things done by the State in creating and establishing the waterway and declarations in the State legislative acts constituted contracts between the State and defendant railroad company and that said waterway, or any part thereof, would never be sold, leased or otherwise disposed of, and that said Act (Chapter 168) impairs the obligations of its contract in violation of Section 10, Article I of the Constitution

of the United States and Section 23, Article I of the Constitution of the State of Washington; that defendant's tide lands and other tide lands abutting upon the waterway are chiefly valuable by reason of their accessibility to said waterway and through it to the waters of Elliott Bay and Puget Sound; "that the right to navigate said waterway includes the right to come to, to land upon and to leave the shores abutting thereon, in the interest of commerce, not only to the abutting owners but to the public who may have business and ocupation with them or through them with each other, and as well the right to construct wharves, docks and piers, on the shores of and extending into said waterway in aid and promotion of navigation and commerce, provided that they do not extend beyond the pier head lines established and adopted as hereinbefore referred to, subject only to proper and reasonable control and regulation by the State of Washington and the United States in the public interest; and this defendant avers that the Act approved March 22, 1913, hereinbefore referred to, and the right or claim asserted by the Port of Seattle thereunder to lease the waterway area hereinbefore described for wharves and docks, and to collect, receive, and enjoy the rentals therefrom, and to deny and deprive

this defendant of the right to construct such wharves and docks, or to lease said area for such proper purposes and to receive and enjoy the rentals therefrom, deprives it of these rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Section 3, Article I of the Constitution of the State of Washington." (Record, pp. 25, 26 and 27.)

No evidence was introduced in support of the allegation in the third paragraph of the answer (see Record, p. 25) that the pier head line was shown on the plat filed by the Board of Harbor Line Commissioners.

The evidence was largely explanatory in character, the facts being not substantially disputed (except as to the pier head line appearing upon the Harbor Line Commissioners' plat which was alleged in the answer and no evidence introduced upon it), the questions involved being questions of law.

The plats introduced in evidence and contained in Volume 2 of the Record are enlightening as showing the situation and are explained by the testimony of the engineer witnesses. These exhibits will be referred to by reference to the Record so far as deemed material in the argument.

After the trial the Court rendered its opinion (Record, p. 32 et seq.) and thereafter entered its decree for the dismissal of the complaint, which decree for convenience we here print in full, omitting formal parts:

"DECREE.

This case having come on to be heard upon the pleadings and the evidence introduced in open court, and arguments of solicitors both on behalf of the complainant and the defendants having been heard, and the cause duly considered, the court finds:

That the complainant has no proprietary rights or interests in the water area between the shore line and the pier-head line in front of the lots owned by the defendant, Oregon & Washington Railroad Company, described in the pleadings herein, and is not entitled to lease the same, nor to deprive the defendant, Oregon & Washington Railroad Company, of access to the navigable waters of said waterway over said water area; and that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for such leasing and collection of revenue therefor, are invalid because the same are in conflict with Section 10, Article 1 of the Constitution of the United States and with the XIVth Amendment to said Constitution.

That the defendant Oregon & Washington Railroad Company has no proprietary interest in said water area, but as the owner of the abutting lots is entitled to access to and from said lots to and from the deep or navigable waters

of said waterway across said water area, subject to proper Governmental supervision.

The court further finds that the State has never established any harbor lines in said waterway, but does not adjudicate upon the right of the State to hereafter establish harbor lines therein or the effect the establishment of such harbor lines would have upon the rights of the parties hereto in such waterway.

The court being of the opinion that complainant is not entitled to any equitable relief herein;

It is ordered and decreed that said bill of complaint be, and the same is, hereby dismissed, without costs to either party." (Record, pp. 38 and 39.)

Exceptions were duly taken by appellant to the denial of the motion to remand, to each portion of the decree and to the refusal of the Court to enter a decree for appellant, and appellant's exceptions are found at pages 39 and 40 of the Record.

Appellant thereafter duly took its appeal to this Court and assigned errors upon the denial of appellant's motion to remand to the State Court, to the refusal of the trial Court to enter a decree for complainant, and to each separate finding and provision of the decree actually entered. (Record, pp. 71 and 72.)

Although the decree of the Court that the State of Washington has never established any harbor lines in the East Waterway was excepted to and error assigned thereon by appellant, we make no point upon this appeal as to that portion of the decree, conceding for the purposes of this case that the State never has established any harbor lines in the waterway.

The assignments of error relied upon on the appeal are as follows:

"I.

That the District Court of the United States for the Western District of Washington, Northern Division, erred in denying complainant's motion to remand the above entitled cause to the Superior Court of the State of Washington for King County.

II.

That said District Court erred in failing and refusing to enter a decree for complainant as prayed for in complainant's complaint in the above entitled cause.

III.

That said District Court erred in entering a decree in said cause finding and decreeing that complainant has no proprietary rights or interests in the water area between the shore line and the pier-head line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings in said cause.

IV.

That said District Court erred in finding and decreeing that complainant is not entitled to lease the waterway area between the shore line and the pier head line in front of the lots owned by the defendant Oregon & Washington Railroad Company, described in the pleadings herein.

V.

That said District Court erred in finding and decreeing that complainant is not entitled to deprive the defendant Oregon & Washington Railroad Company of access to the navigable waters of said waterway over said waterway area.

VI.

That said District Court erred in finding and decreeing that the provisions of Chapter 169 of the Laws of Washington of 1913, providing for leasing of said waterway area and collection of revenue therefor, are invalid, because the same are in conflict with Section 10, Article I of the Constitution of the United States and with the Fourteenth Amendment to said Constitution.

VII.

That said District Court erred in finding and decreeing that the defendant Oregon & Washington Railroad Company as the owner of the abutting lots is entitled to access to and from said lots to and from the deep or navigable waters of said waterway across said waterway area subject to proper Governmental supervision.

IX.

That said District Court erred in finding and adjudging in the said decree that complainant is not entitled to any equitable relief in the above entitled cause.

X.

That said District Court erred in decreeing that the bill of complaint in the above entitled cause be dismissed."

(Record, pp. 71 and 72.)

The discussion of the errors assigned, other than the first assignment which related to the denial of appellant's motion to remand, will be combined, as they all relate to the one question as to the ownership and rights in the waterway area in the East Waterway between the pier-head line and the property line.

ARGUMENT.

The Court Erred in Denying the Motion to Remand to the State Court.

This cause was removed from the State Court to the United States District Court on respondents' petition.

The sole ground of removal was diversity of citizenship.

See Petition for Removal, Record, p. 13-15.

While there is a Federal question in the case, it did not appear in either the complaint, petition for removal, or elsewhere in the record in the State Court, but was first raised in the answer filed in the Federal Court.

See Record of State Court, Record, p. 1-17.

See Answer, Paragraphs V and VI, Record, pp. 26, 27.

The motion to remand was made on three grounds. We only urge one on this appeal, being the third ground specified in the motion to remand, as follows:

> "Because the State of Washington is the real party in interest as plaintiff in this action, the nominal plaintiff, the Port of Seattle, a municipal corporation, being merely the agent and representative of the State of Washington in the granting of permits or leases of waterway areas and harbor areas within said Port District; and the State of Washington being the real party in interest, said cause is not within the jurisdiction of the above entitled District Court of the United States." (Record, p. 19.)

The appellant duly excepted to the order denying the motion to remand. (Record, p. 23.)

And assigned error thereon on this appeal. (Assignment of Error No. 1, Record, p. 71.)

This cause is a proceeding in the nature of an action to quiet the title of the State of Washington to a parcel of waterway area as against the claims of the respondent Oregon & Washington Railroad Company, the complaint alleging as the basis of its right to maintain the suit that "the waterway area * * * * is within the jurisdiction of the plaintiff acting for and on behalf of the State of Washington." (See Complaint, Paragraph IV, Record, p. 2.)

Under the terms of the Act of the State of Washington providing for the giving of permits for the improvement and use of waterway areas inside of the pier-head lines (quoted in full in the statement of the case herein) the authority to give such permits is conferred upon the State Land Commissioner, followed by the provision that:

> "In any case where such waterway shall be within the territorial limits of a port district organized under the laws of the State of Washington, the duties herein assigned to the state land commissioner shall be exercised by the port commission of such port district, and in every case the rentals received shall be disposed of as follows: Seventy-five (75) per cent. shall be paid by the state treasurer to the county treasurer of the county wherein such port district is

situated, for the use of said port district and twenty-five (25) per cent. into the state treasury. * * * *"

Laws of Washington of 1913, p. 582, 584.

The statute makes the State Land Commissioner the State agency as to waterway areas not within port districts and all rentals therefor are to be paid into the State Treasury.

As to waterway areas within port districts there is no difference, except that "the duties herein assigned to the State Land Commissioner shall be exercised by the Port Commission." It is true that in the latter case the State Treasurer pays part of the money received from rentals of the State's waterway areas to the Port. But the property involved is the State's property, the rentals received are paid to the State and the appellant through its Commission is simply performing as the State's agent the same duties with reference to this waterway area that are performed by the State Land Commissioner as to other waterway areas.

We submit, therefore, that the suit is one involving the rights of the State of Washington, is brought for its benefit, and that the State is the

real party and that the appellant appears solely in a representative capacity.

It is well settled that this Court will, for the purpose of determining jurisdiction, determine who is the real party in interest, so far as the same appears in the record, and if the real party is a State, and the nominal party but a representative thereof, jurisdiction in the Federal Court will be held not to exist. If the suit is brought against one who is merely a representative of the State, the State will be treated as the real party and jurisdiction denied by force of the Eleventh Amendment. If the suit is brought by a representative of the State, the State will be treated as the real party, and as a state is a citizen of no state, jurisdiction will be denied, so far as it depends on the diversity of citizenship.

Murray v. Wilson Distilling Co., 213 U. S., 151, 29 Sup. Ct. Rep., 458.

Lankford v. Platte Iron Works, 235 U. S., 461, 35 Sup. Ct. Rep., 173.

Ex Parte Ayers, 123 U. S., 443, 8 Sup. Ct. Rep., 164.

Hagood v. Southern, 117 U. S., 52, 6 Sup. Ct. Rep., 608.

Louisiana v. Jumel, 107 U. S., 711, 746, 2 Sup. Ct. Rep., 128.

In the case of *Murray* v. *Wilson Distilling Company* above cited the action arose under the State Dispensary Act of South Carolina. The State had passed an act to provide for winding up the affairs of the State dispensary system, providing for a commission to be appointed by the Governor to collect the assets, pay the liabilities and pay the balance into the State treasury. A suit was brought in the Federal Court against the commissioners, the jurisdiction of the Court being based upon diversity of citizenship just as it is in the case at bar. The suit was based upon the theory that the law of the State of South Carolina had placed the dispensary funds in the hands of the commissioners as a trust fund and it was claimed that they were not discharging their duties and an injunction was sought against further disposition of the fund and the appointment of a receiver of the fund. Mr. Justice White rendered the opinion of the Court and it was held that the funds were State funds, that while the State was not named as a party defendant the defendants in fact represented the State and that the suit was in fact one against the State and within the inhibition of the Eleventh Amendment to the Constitution.

The case of *Lankford* v. *Platte Iron Works* above cited was a suit in equity against the Oklahoma State Banking Board. Under the law of Oklahoma there is a provision for a bank depositors' guaranty fund created by an assessment upon banks and administered by the Oklahoma State Banking Board, created by the State. The Board had taken charge of the assets of a bank for the purpose of winding up its affairs and the complainants, claiming to be creditors, conceiving that the Banking Board was not performing its duty, brought the suit to obtain a decree against the Board requiring it to issue certain certificates of indebtedness provided for by the law and to make assessments to provide for their payment and for general relief. The defendants moved to dismiss the suit for want of jurisdiction as being one against the State of Oklahoma in violation of the Eleventh Amendment.

The case was decided by a majority of the Supreme Court, Justice McKenna delivering the opinion of the Court which was concurred in by Chief Justice White and Justices Holmes, Hughes and McReynolds. The dissenting opinion was rendered by Justice Pitney, with whom concurred Justices Day, Van Devanter and Lamar.

By the majority opinion it was held that the suit was a suit against the State of Oklahoma although not named as a party and jurisdiction was held not to exist and the cause dismissed.

It is to be noted, however, that the ground of the dissenting opinion is that under the Oklahoma law the State has no property interest in the guaranty fund, Mr. Justice Pitney saying in his opinion that:

> "It seems to me clear that, by the language and evident meaning of this law, the state has no property interest in the guaranty fund. No part of it is raised through general taxation, nor can any part of it be lawfully placed in the treasury of the State, or devoted to any of the ordinary purposes of the government, or to any purpose other than the payment of depositors. The State, it is true, through the banking commissioner, holds the bare legal title to the fund, and enforces in the name of the State the liabilities of the failed banks, but this is done for the sole benefit of the fund. Thus, the State has title only, but without real ownership. Not even is the credit of the State pledged for the success of the scheme, for while Section 8 permits banks to display an official certificate of compliance with the law, the certificate declares that safety to the depositors is guaranteed not by the State, but by the depositors' guaranty fund, and it is made a misdemeanor for any bank officer to advertise the deposits as guaranteed by the State. It would, I think, be dif-

ficult to find language more clearly showing that the State is neither interested in the fund nor responsible to the depositors with respect to it."

Lankford v. Platte Iron Works, 235 U. S., 461, 35 Sup. Ct. Rep., 173, at 178.

Applying the doctrine of the foregoing cases to the case at bar, we submit that it is clear that this proceeding is one brought on behalf of the State. It will not be denied that the title to the waterway areas is vested in the State. The suit is brought for the purpose of quieting the State's title, basing the right of the Port to bring the action on behalf of the State upon the powers conferred upon the Port as the representative of the State both in the Port Act from which we have quoted in the statement of the case and in Chapter 168 of the Laws of Washington of 1913 which has been set forth in full.

While it is true that under the terms of Chapter 168 of the laws of 1913 when the State has collected the rental of the waterway areas involved a portion of the money is paid to the Port and a portion kept in the State Treasury, the property rented is the State's property, the money collected is the State's money and is paid into the State treasury and

such disposition made by the State Treasurer as the law directs.

In *Louisiana* v. *Jumel*, 107 U. S., at 722, above cited, the suit being one against the State Treasurer on behalf of bond holders who claimed to be entitled to receive certain moneys paid into the State Treasurer's hand, the Court said:

> "The treasurer of state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax, just as he is the keeper of other public moneys. The taxes were collected by the tax-collectors and paid over to him, that is to say, into the State treasury, just as other taxes were when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them, but only as the agent of the State. If there is any trust, the State is the trustee, and unless the State can be sued the trustee cannot be enjoined. The officers owe duty to the State alone, and have no contract relations with the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them."

So, in the case at bar, the Port Commission is authorized to give permits for the use of the State's

waterway, and to act for the State in controlling the waterway and to collect revenue for the State—but its function is only to perform State duties under State laws.

Cases like *Ex Parte Young,* 209 U. S., 123, 28 Sup. Ct. Rep., 441, and *Scully* v. *Bird,* 209 U. S., 481, 28 Sup. Ct. Rep., 597, and many cases of similar character involving suits brought against State officers who are attempting against the plaintiff to enforce an unconstitutional law and in which it is held the State is not a party, are not contrary to the doctrine contended for in this case, the ground of the decision being, as stated in the syllabus of the Young case, that the State officer's "act in attempting in the name of the State to enforce a void enactment is merely illegal because in conflict with the superior authority of the Federal Constitution and he is stripped of his official character and the prohibition against his proceeding does not, therefore, affect the State in its governmental capacity."

Nor do those cases in which it is sought to enjoin railroad or other rate fixing public service commissions from action prejudicial to a complainant, like the case of *Prentis* v. *Atlantic Coastline Co.,* 211 U. S., 210, 29 Sup. Ct. Rep., 67, and *Mo., Kan.* &

Tex. Ry. Co. v. *Hickman,* 183 U. S., 53, 22 Sup. Ct. Rep., 18, conflict with the position taken in this case. The principle upon which those cases are based is that the State is not in fact the real party in interest. As the Court says in the case last cited:

> "It is not an action to recover any money for the State. Its results will not inure to the benefit of the State as a state in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate."
>
> Mo., Kan. & Tex. Ry. Co. v. Hickman, 22 Sup. Ct. Rep., at 21.

The case from which we have just quoted was one brought as plaintiff by a State officer in a State Court and removed into the Federal Court on the ground of diversity of citizenship. In discussing the question of whether it could be so removed, the Court said:

> "Was the State the real party plaintiff? It was at an early day held by this court, construing the Eleventh Amendment, that in all cases where jurisdiction depends on the party it is

the party named in the record. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. But that technical construction has yielded to one more in consonance with the spirit of the amendment, and in *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164, it was ruled upon full consideration that the amendment covers, not only suits against a state by name, but those also against its officers, agents, and representatives where the State, though not named as such, is nevertheless the only real party against which in fact the relief is asked, and against which the judgment or decree effectively operates. And that construction of the amendment has since been followed. That amendment refers only to suits brought against a state. But applying the same principles of construction to the removal acts and to cases in which it is claimed that the state, though not the nominal, is in fact the real, party plaintiff, it may fairly be held that the state is such real party when the relief sought is that which inures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate. Such a case was *Ferguson* v. *Ross*, 3 L. R. A., 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the State. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery."

Mo., Kan. & Tex. Ry. Co. v. Hickman, 183 U. S. 53, 22 Sup. Ct. Rep., 20.

Ferguson v. Ross, 38 Fed. Rep. 161, 3 L. R. A. 322.

That a State is not a citizen of any State, and that a suit brought by a State cannot be removed to the Federal Court on the ground of diversity of citizenship, see

Stone v. South Carolina, 117 U. S. 430, 433.

Germania Insurance Co. v. Wisconsin, 119 U. S., 473.

Arkansas v. Kansas & T. Coal Co., 96 Fed. Rep. 353.

The right to remove a case from the State to the Federal Court is determined solely upon the face of the record made in the State Court, and if an inspection of that record does not disclose ground for removal it must be remanded.

Crehore v. Ohio & M. R. R. Co., 131 U. S., 433, 9 Sup. Ct. Rep. 692.

Ala. G. S. R. Co. v. Thompson, 200 U. S., 206, 26 Sup. Ct. Rep. 161, 164.

West Side R. Co. v. Cal. Pac. R., 202 Fed. Rep. 331, 333.

Phillips v. Western Terra Cotta, 174 Fed. Rep. 873.

Thompson v. Ward, 199 Fed. Rep. 861.

Key v. West Ky. Coal Co., 237 Fed Rep. 258.

Smith v. Western Union Telegraph Co., 79 Fed. Rep. 132.

Berry v. Mobile & O. R. Co., 228 Fed. Rep. 395.

Beadleton v. Harpending, 32 Fed. Rep. 644.

And the Federal Court cannot retain jurisdiction of a case improperly removed on the ground of diversity of citizenship even though a Federal question is raised in the case after its removal to the Federal Court.

Crehore v. Ohio & M. R. R. Co., 131 U. S. 433, 9 Sup. Ct. Rep. 692.

Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. Rep. 9.

Healy v. McCormick, 157 Fed. Rep. 318.

Fitzgerald v. Mo. Pac. Ry. Co., 45 Fed. Rep. 812, 814.

Shane v. Butte Electric Ry., 150 Fed. Rep. 801 at 813.

Broadway Insurance Co. v. Chicago G. W. Ry. Co., 101 Fed. Rep. 507.

Santa Clara County v. Goldy Machine Co., 159 Fed. Rep. 750.

Grand Trunk Ry. Co. v. Twitchell, 59 Fed. Rep. 727.

Miller v. Soule, 221 Fed. Rep. 493.

ARGUMENT ON THE MERITS.

Upon the merits this case turns upon the question as to the ownership and rights existing in that part of the East Waterway situated between the boundary line of respondent railroad company's property and the pier-head line in the East Waterway, which strip is called waterway area in Chapter 168 of the Laws of Washington of 1913, which we have quoted in full in the statement of the case.

It is not disputed that East Waterway and the abutting property owned by respondent railroad company as appurtenant to which respondent railroad company claims rights in the waterway area are wholly situated below the line of mean high tide in the harbor of Seattle as it originally existed; that all these tide lands were owned by the State of Washington and that whatever rights respondent railroad company may have in the waterway area it has by virtue of the purchase from the State by its grantors of the property abutting upon the East Waterway. We also understand it to be respondent's position that the State of Washington in laying out East Waterway and providing for its excavation and in selling the abutting tide lands had full

power to create in the purchasers of such abutting tide lands rights of wharfage and access to the navigable waters of East Waterway or to exclude such purchasers from any rights therein and in all respects to create or withhold such rights in East Waterway as should be determined by the State.

Respondents contend, however, as we understand their position, that the waterway having been created by the State as a public waterway and by the terms of the act under which it was created being expressly reserved from sale or lease as a public way for water craft, that the waterway was thereby created a highway and purchasers of the abutting State lands, by virtue of their purchase of such lands upon the waterway, were as a matter of law entitled to access to the navigable water of the waterway and to wharf out to deep water. We understand also that respondent claims that the fact of a pierhead line being marked upon the original plat of the tide lands by which respondents' grantors bought indicated an intention that the purchasers from the State of abutting State lands should have a right to access and to wharf out.

It is further respondents' contention that, purchase having been made from the State under these

circumstances, Chapter 168 of the Laws of Washington of 1913, which we have above quoted in full and which provided for giving permits to third persons for the use of the waterway area for the construction of wharves and other purposes, is invalid under the United States Constitution as impairing the obligation of the contract between the State and respondents' grantors created by the waterway and tide-land acts taken together with the grants of the property by the State to respondents' grantors, and as taking respondents' property without due process of law.

In the opinion filed below by the trial Court certain of its language appears to deny to respondent railroad company the right to construct wharves or other structures upon the waterway area (Record, p. 37) and to indicate that it was the opinion of the Court that the State might construct or authorize the construction of piers upon the waterway area and that such action would not infringe any right of the riparian owner. (Record, p. 35.)

On the other hand, the Court quotes certain language from the case of *State* v. *Sturtevant*, 76 Wash., 158, at page 166, and apparently holds that respondent railroad company has a vested right in

access from its abutting property to navigable water in the waterway (Record, p. 37), and also quotes language from the same case suggesting the right to wharfage in respondent (Record, p. 38), though this seems to be contrary to statements contained in the earlier portion of the opinion.

The Court finally concludes in the opinion that the lease given by the respondent railroad company to the respondent J. F. Duthie & Company (for shipyard purposes) and the permit given by the appellant to the same lessee for the same purposes were not for purposes to which the waterway area could be devoted by either party and directed the dismissal of the suit on the theory that appellant was at fault and must purge itself of fault before it could have standing in a Court of equity. (Record, p. 38.)

It will be seen, however, by reference to the decree which we have above quoted in full that the decree was not based upon the latter ground but upon the theory that appellant has no proprietory right or interest in the waterway area and is not entitled to lease it nor to deprive respondent railroad company of access to the navigable waters of the waterway over the waterway area and that the provisions

of Chapter 168 of the Laws of Washington of 1913 providing for the leasing of waterway area and the collection of revenue therefor are invalid upon the two grounds above referred to. The decree further affirmatively decrees a right of access in the respondent railroad company from its private property across the waterway area to navigable waters.

Appellant's contentions on this appeal are:

1. The State, prior to 1913 when Chapter 168 was passed, never in fact fixed or recognized any pier-head line in the East Waterway and the marking of the pier-head line on the tide land appraiser's plat was without any authority of law and respondents' grantors in buying from the State did not and could not rely upon such a line as creating or indicating the creation of any rights in the waterway.

2. The sale by the State to respondents' grantors of the property abutting upon East Waterway carried with it no vested right of any kind in the waterway or in its use, either for access or wharfage.

3. The State, notwithstanding the declaration in the Waterway Act that the waterways created thereunder "are and shall forever be reserved from

sale or lease as public ways for water craft," retained as against the abutting land owners and all the world the right to deal with, change, modify or vacate the waterway and all areas within its boundaries, and Chapter 168 of the Laws of Washington of 1913 was a valid exercise of the State's sovereign power, and that the Act of 1913 in fact was passed for the purpose of providing wharves and other structures to make the waterway available for its primary uses.

4. The respondent railroad company, not having exercised the preference right to wharfage given by Chapter 168 of the Laws of 1913 within the time therein provided, has no right of any kind in the waterway area.

5. The decree of the lower Court should be set aside and (unless the case is remanded to the State Court as we contend it should be) a decree should be entered quieting the title of the State of Washington, and that of appellant as its representative, in and to the waterway area as against the respondent railroad company and decreeing that respondent railroad company, as the owner of the tide land abutting upon said waterway area, has no right, title or interest in said waterway area, or any part

thereof, and enjoining the respondent railroad company from claiming or exercising any right in or jurisdiction over the waterway area referred to.

I.

THE PIER-HEAD LINE ON TIDE LAND PLAT IS NOT AVAILABLE TO RESPONDENT IN SUPPORT OF RESPONDENT'S CLAIMS.

We do not, of course, know what position the respondent railroad company will take upon this appeal in support of its claims to the waterway which is the subject of the controversy. In respondent's brief filed in the Court below counsel for respondent says:

> "If there had been no pier-head line designated on the plat of these waterways by the State at the time of their creation, it could plausibly be argued that the grant by the State of the adjoining lots by numbers would not convey any right to wharf out into the waterway, under the rule that a grant by a sovereign State is construed most strongly against the grantee. But where the State has established such a line marking the line of navigability, it is universally held, so far as our investigations show, that the establishment of such a line is an invitation and concession to the shore owner to

wharf out to it, and that a grant by the State of the abutting land carries with it the right to wharf out to such established line, in the absence of any legislation of the State to the contrary."

It was followed by a citation of the cases of *Aborn* v. *Smith*, 12 R. I., 373, and *Miller* v. *Mendenhall*, 44 N. W., 1141.

We assume that respondent's position on this appeal will be the same.

This position, however, is not supported by the record in the case. An examination of the Waterway Act, which is hereinbefore printed in full, and of the Harbor Line Commission Act fixing the powers and duties of the Harbor Line Commission, the material parts of which are set forth in the early part of this brief, will show that there is no provision made authorizing the Harbor Line Commission, or anyone else, to establish or fix pier-head lines in any plat of the waterway. The Harbor Line Commission was directed to lay out the waterways and set posts along their outer boundaries, to survey and plat them and connect them with the Government surveys and to file the plats, and the waterways as so marked out as a whole were, so far as the terms of the Waterway Act are concerned, reserved from

sale or lease as public ways for water craft. It was further provided in the Act that where the words "ordinary water craft" are used they shall be construed to mean boats, barges and other water craft drawing two and one-half feet and over of water. (See Section 6 of Waterway Act.)

Not only is no authority found anywhere in the laws of the State of Washington authorizing the Harbor Line Commission, or anyone else, to plat or fix a pier-head line in any waterway, but there is nothing in the record to indicate that they ever attempted so to do. The pier-head line appears upon appellant's exhibit 1 (see Record, Vol. II, p. 79). The certificate upon this plat shows that it is a copy of those portions of plates 32, 33, 36, 37, 41, 44, 45, 46, 47 and 48, Seattle Tide Lands, lying adjacent to the East Waterway, said plates being found in Vol. II, Seattle Tide Lands, filed in the office of the Board of State Land Commissioners, March 15, 1895. So far as this plat, therefore, indicates where the pier-head line upon the plat came from it appears that it came from the plats filed of Seattle Tide Lands.

By reference to exhibit 3 (see Vol. II of Record, p. 80) it appears that exhibit 3 also shows the pier-head line upon the East Waterway. Exhibit 3, as

identified in the testimony of the witness Blackwell, (Record, p. 42) is the index sheet of plats covering the tide lands, as filed in King County, and, as the witness testified, exhibit No. 1 shows two or three (portions of ten the certificate to exhibit 1 indicates) of the same plats put together in one map. Exhibit 3 in fact is the general plat or index sheet showing a general view of the Seattle Tide Lands and which was attached to plats Nos. 26 to 56 of the Seattle Tide Lands made by the King County Board of Appraisers under the Tide Land Act.

We do not believe, notwithstanding the allegations of the answer, that counsel for respondent will contend that the plat of East Waterway filed by the Harbor Line Commissioners, and who alone were authorized to plat waterways, (though they had no power to fix pier-head lines or do anything having to do with operation of the waterway when so platted) contains any pier-head line. It does not in fact, though, as a copy of that plat is not in the evidence, this Court cannot pass upon the fact. However, respondent has the affirmative of the issue upon the proposition alleged in his answer that the contract he has with the State has been impaired by Chapter 168 and if he contends for any rights

based upon the plat of the Harbor Line Commission the burden was certainly upon the respondent railroad company to get such a plat, if any had ever existed, into the record.

It does appear, however, that a pier-head line was sketched in by the Tide Land Appraisers who had authority to plat the tide lands. They did not, however, have any authority whatever to deal with waterways, their authority being limited strictly to platting the tide lands which were subject to sale and it is obvious, the East Waterway being reserved from sale by the Waterway Act, that the platting of any lines within the East Waterway was wholly outside of their powers. This will, of course, clearly appear by reference to the Tide Land Act, the material portions of which we have heretofore printed in this brief.

The reason the pier-head line was placed on the plat by the Tide Land Appraisers (though improperly, of course, it being outside of their powers) would appear to be that prior to the filing of their plat on March 15, 1895, the United States War Department had in fact fixed the pier-head line in East Waterway. (See Blackwell's testimony, Record, p. 42.)

The statement contained in paragraph IV of the complaint (see Record, p. 2) that "the State of Washington and the United States Government have established in said East Waterway a distance of 125 feet from the shore-line of the premises herein described a pier-head line" must be construed as referring to the fact that the Waterway Area Act of 1913, being Chapter 168 involved in this suit, refers to the pier-head line fixed by the United States Government as being the boundary of the waterway areas dealt with in that chapter, the pier-head line being recognized, so far as our search of Washington laws has disclosed, first in that Act, and also the fact of the moving back of the 250 foot pier-head line as originally fixed by the War Department on November 17, 1894, and thereafter moved back in 1914 to 125 feet from the property line. (See Blackwell's testimony, Record, p. 42.)

This change of the pier head line appears to have been made by the War Department at a hearing in which the property owners and the Port Commission participated. (See testimony of Nicholson, Record, pp. 55 and 56.)

It will be remembered that under the Port Act jurisdiction of the waterways was vested first in the

Port in 1911 and the change of the pier head line was made three years later, in 1914.

The matter of the location of pier head lines is committed by the United States Government to the War Department. (30 U. S. Statutes at Large, ch. 425, sec. 11, p. 1151.)

It therefore appears that, so far as the respondent railroad company relied upon a pier head line in the East Waterway, it was a pier head line established by the Federal Government and no State action fixing it prior to the purchase of the property by respondent railroad company appears. It does appear that the Port Commission, as a representative of the State, did, in 1914, many years after the grant, join in a proceeding to get the War Department of the United States Government to change the line and that the United States pier head line was recognized in 1913 by the Legislature in chapter 168, and it does appear that the Tide Land Appraisers who made the plat of the tide lands sketched in the Government pier head line on their plat. No authority, however, to deal with that pier head line as a part of the plat appears in the Tide Land Act, and that the tide lands embraced within the limits of the waterway were not subject to their jurisdic-

tion for the purpose of platting and appraisement, see *State vs. Superior Court*, 91 Wash., 454.

In that case there was involved the question of the right of a railroad corporation to condemn tide lands embraced in a waterway which had not been excavated and the Court held that where tide land had been appropriated to waterway or other public uses they would not be included under the terms of the statute providing for sale or condemnation of tide lands.

It is therefore clear that when under the Tide Land Act provision was made for the platting and sale of the State's tide lands that tide lands embraced within the limits of waterways were excluded and that the placing of the pier head line theretofore established by the Federal Government in the East Waterway upon the plat made by the King County Tide Land Appraisers in their plat of the tide lands was wholly outside of their authority, and no rights could be predicated thereon by any purchaser of tide lands abutting upon the waterway.

Respondent's theory, therefore, that the appearance of the pier head line upon the plat was an indication that the State intended that purchasers of lots abutting upon the waterway should have the

right to wharf out to the pier head line is shown to be without foundation.

The cases cited by counsel for respondents upon the hearing below to support its position that the pier head line upon the plat indicated an intention on the part of the State that its purchasers were given the right to wharf out to such pier head line do not, we submit, have any force in view of the fact, which we think clearly appears, that there was no plat upon which any such pier head line was shown by any authority binding upon the State. Not only so, but the cases themselves, upon examination, have no weight when applied to the situation in the State of Washington, as will readily appear by an examination of the cases.

The case of *Miller v. Mendenhall*, 44 N. W. 1141, was a case involving the question of riparian rights as between private parties, the question being not whether the State had conveyed riparian rights, but as to who owned such rights as existed as between parties other than the State. It appears, also, in the case that a harbor line had been established by the city under legislative authority. The rights involved were riparian rights on a fresh water lake. The case was largely based upon the decision of this

Court in *Yates v. Milwaukee*, 10 Wallace, 497, which latter case is distinguished by the Supreme Court of the State of Washington in the case of *Eisenbach v. Hatfield*, 2 Wash. 236, 247, 248, as being a case upon non-tidal waters and involving rights to an existing wharf, as our State Supreme Court says in reviewing the case, built presumably by the State's license. In fact, the doctrine of *Yates v. Milwaukee* is clearly held in the *Eisenbach* case not to apply to rights of abutters on tidal waters in the State of Washington, being contrary to the Constitution of the State.

The other case relied upon by respondents below on this point was *Aborn v. Smith*, 12 R. I. 373, which was also a controversy between private owners and not between an owner and the State. That case, also, was based upon the fact of the State having established a harbor line, which is not the situation in the case at bar.

Not only so, but notwithstanding the holding in the Rhode Island cases that the establishment of a harbor line taken together with the legislation in Rhode Island confers upon abutting owners the right to fill out to the channel across the State tide lands, it is held in that State that the right so to do is merely a license and that if the State sees fit to

erect structures thereon the abutting owner has no right to compensation.

> Gerhard v. Seekonk River Bridge Commissioners, 5 Atl. Rep. (R. I.), 199.

And the Supreme Court of Washington has held that the establishment of pier-head lines in front of harbor area leased by the State confers no rights in the lessee in the strip between the harbor area and the pier-head line.

> Wilson v. Oregon-Washington R. & Nav. Co., 71 Wash., 102, 107.

(In examining the above case it is desirable to note that the syllabus by inadvertence suggests the establishment of pier-head lines by the State. There is nothing of that kind in the case itself, the question being as to the effect of the establishment of outer and inner harbor lines creating a harbor area which did not reach out to the Government pier-head line.)

The Supreme Court of Washington has also held that there is no provision in the legislation of this State for establishing pier-head lines and that no rights are fixed by the appearance of a pier-head line upon a State tide land plat. The Court says:

"The use of the words 'pier-head line' on the plat prepared by the State and in the decree is an unfortunate misuse of terms. The words mean nothing under our Constitution and statutes."

Puget Mill Co. v. State, 93 Wash., 128, 141.

II.

THE SALE BY THE STATE OF WASHINGTON TO RESPONDENTS' GRANTORS CARRIED WITH IT NO RIGHT OF ACCESS TO OR WHARFAGE IN EAST WATERWAY.

The question of the pier-head line being disposed of, the case before the Court is one in which the State of Washington has platted a public waterway and has platted its tide lands abutting upon the waterway into lots and sold them to the respondent railroad company's grantors with nothing in either grant or plat indicating any intention to confer upon its grantee any right in the waterway of any kind. If respondent railroad company has in fact any right either of access across the waterway area or of wharfage therein it is a right implied from the grant and nowhere indicated in terms.

For the determination of the effect of the grant in question we must look to the statutes and Court decisions of the State of Washington.

The shore of navigable waters, and the tide lands thereunder, are owned by the State in which they lie as a part of its sovereignty, and all rights therein claimed under State grants are to be determined by the local law of the State in which the lands are situated, and the decisions of the Courts of such State in the construction of such grants and the law applicable thereto, are binding upon the Federal Courts.

Hardin v. Jordan, 140 U. S., 371, 11 Sup. Ct. Rep. 808.

Shively v. Bowlby, 152 U. S., 1, 13, 14 Sup. Ct. Rep. 548.

St. Anthony Falls Water Power Co. v. Board of Water Com., 168 U. S., 349, 18 Sup. Ct. Rep. 157.

United States v. Mission Rock Co., 189 U. S., 391, 23 Sup. Ct. Rep. 606.

Weber v. Harbor Com'rs, 18 Wall. 57.

There are many other cases decided by this Court to the same effect, but as they are cited and reviewed in the above cases, and as this position was not contested below, and will probably not be contested here, we will not burden the brief with further citations to this point.

An examination of the legislation of the State

of Washington pertaining to the question at issue and which has been set forth in this brief discloses no intimation or suggestion of any riparian right being included or implied from the State's grant.

And the Supreme Court of the State of Washington in accordance with the general trend of judicial authority has held that State grants are to be strictly construed.

> "Every grant by a sovereign State is construed most strongly against the grantee. Nothing passes by intendment or implication. And if the law or the State deed fixes no limit to a grant it becomes the duty of the Court to fix the narrowest limit that will reasonably satisfy the terms of the grant."
>
> Pearl Oyster Co. v. Hueston, 57 Wash., 533, 538.

There are no decisions of the Supreme Court of the State of Washington as to the construction of a State grant of tide lands abutting upon an artificial State waterway. But East Waterway is in fact but a deepened arm of the sea. Its site has always been covered by the ebb and flow of the tide, as were also the abutting tide lands now owned by the respondent railroad company and which were conveyed to its grantors by the State.

We submit that there is no reason to believe that the State in conveying its lands bordering upon such an artificial waterway intended to convey any greater rights than a similar grant of upland bordering upon a natural waterway would have conveyed. Certainly if the State had intended that its grantee of tide land (constructed into artificial upland by filling) was to have greater rights in the public navigable waters of the State upon which his land abuts than the owner of natural uplands abutting upon a natural navigable waterway there would have been something in the statute or in the State grant indicating such an intention.

The Constitution of the State of Washington contains the following provision:

> "The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State."

Constitution of Washington, Article XVII, Sec. 1.

1 Remington & Ballinger's Code, p. 114.

The construction and enforcement of this Constitutional provision as relating to tide lands and riparian rights of owners of lands abutting upon tide waters engaged the attention of the Supreme Court of Washington very soon after the adoption of the Constitution and in the case of *Eisenbach* v. *Hatfield,* 2 Wash., 236, the subject received exhaustive consideration. In that case the Court said:

> "We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the State or its grantees to extend wharves in front of his land below high water mark." (See p. 249.)

Again at page 253 the Court says:

> "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good. If the State cannot exercise its Constitutional right to erect wharves and other structures upon its public waters in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self-development, which every government is supposed to possess—a proposition to which we cannot assent. See Galveston v. Menard, 23 Tex. 349. Nor do we think this view in any way conflicts with the constitution of the State, but, on the contrary, we believe it

> is in strict harmony with it, when all its parts are construed together. We cannot think that the building by the State or its grantees of wharves upon shores of navigable waters would constitute either a taking or damaging of private property for public use, in contemplation of the constitution. See *Com. v. Alger, supra.*"

The doctrine of the case of *Eisenbach* v. *Hatfield* has been followed without substantial qualification ever since it was rendered, the Courts continually reverting to it and reaffirming its doctrines as the law of the State.

> *Harbor Line Commissioners v. State,* 2 Wash. 530.
>
> *Lownsdale v. Grays Harbor Boom Co.,* 54 Wash. 542.
>
> *Newell v. Loeb,* 77 Wash. 182.
>
> *Hill v. Newell,* 86 Wash. 227.

The case of *Newell* v. *Loeb* cited above was a case in which damages were sought by the owners of lands abutting upon the Duwamish River for diversion of the stream by the State so that the abutting lands instead of running to the navigable waters of the river would be a half-mile from the river. It was held that the diversion of the stream and the taking away of access to the waterway occasioned no legal damages to the abutting owners, the State owning the bed of the stream and being en-

titled to do what it would with its own. Duwamish River is the stream coming into Seattle Tidelands from the South, and East Waterway was so platted as to carry part of its waters as required by Section 3 of the Waterway Act, and the Ox Bow Bend which was cut off in the improvement of the river and which was involved in the case of Newell v. Loeb, was some two or three miles up-stream from the site of the present controversy. See Plaintiff's Exhibits 4 and 5 and testimony of Blackwell, Record, pp. 43, 44, 45.

In deciding the case of Newell v. Loeb the Court said:

> "The appellants Loeb and Moyses requested the Court to give an instrution to the effect that persons owning property upon a navigable stream have the right to the use of that stream for the purposes of approach, the construction of wharves, docks, and for all the usual purposes of navigation; and that, if the jury should find that either of such purposes would be lost as to Loeb and Moyses by reason of the improvement contemplated, the jury might consider such fact in determining the amount of damages. The Court refused this instruction, but gave an instretion to the effect that the jury should not take into consideration the fact that the main channel of the Duwamish River might be diverted by reason of the improvement, and that the State or its subsidiary corporation, the

waterway district, might claim the bed of the river as a diverted stream.

The waterway district was not seeking to take any of the property of these appellants. But it is claimed by them that, because the channel of the Duwamish River was changed at the Ox Bow bend so as to leave the property of these appellants one-half mile from the new channel, this was damaging of their property on account of which they are entitled to be compensated. It is conceded in the case that the Duwamish River is a navigable river. These instructions raised the question, which is presented here by the appellants, whether the State takes title to the bed of navigable rivers or whether, when the bed of the river is changed or reclaimed, the title to the bed belongs to the adjoining owners.

There are many conflicting opinions upon this question. But we think it is set at rest in this State by many decisions heretofore rendered. The Constitution of this State, at Sec. 1, of Article 17, declares that the State asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all rivers and lakes. In Shively v. Bowlby, 152 U. S. 1, it is said:

> 'The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or grant-

ing rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.'

In *Grays Harbor Boom Co. v. Lowusda'e*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, this court said:

'Legislation has proceeded upon one of two theories with reference to tide and shore lands. The one, that the State will recognize a riparian right in the upland owner and compel the public to subordinate its rights (except as to navigation) to his convenience. The other is that the title to all tide and shore lands is in the State, and may be sold, leased, or otherwise disposed of in aid of business and commerce, and without reference to the comfort and convenience of the upland owner. This State has asserted the latter doctrine. It will thus be seen that the case involves primarily the question of State policy. The State has a right to deal with its own property as its own. There is, therefore, no Federal question involved.'

See also *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59; *State ex rel Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945. In the case last cited, after reviewing the question as to the right of an upland owner to take water from a navigable lake, we said:

'No decision of this court has come to our notice dealing directly with a claim of water for irrigation made by an upland owner

by reason of such land bordering upon navigable water; but it seems to us that our constitutional declaration of ownership, and former decisions touching the effect of that declaration, are clearly opposed to the contention that an upland owner can make lawful claim to the use of navigable water upon which his land borders, and rest such claim solely upon the ground that he has a common law right in such water by reason of his land bordering thereon, as against the State or one who appropriates such water in pursuance to the laws of the State.'

And in *Commissioners Commercial Waterway District No. 2, etc., v. Seattle Factory Sites Co., supra,* at page 194, we said:

'It may be conceded that a description in a conveyance which bounds the land conveyed by a stream, if unnavigable, will be construed as meaning the thread of the stream, but where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee's rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream. (Citing authorities.) We understand it to be conceded in the briefs of counsel that Cedar river is unnavigable and that Black river is navigable. As to the latter, it is plain that the title to the bed thereof is not in appellant, but is in the State. Section 1, article 17, State constitution.'

From these, and numerous other authorities which might be cited, it is plain that the State is the owner of the bed of the Duwamish river,

being a navigable river, and that the appellants Loeb and Moyses have no interest therein. And the fact, if it is a fact, that their land borders upon the shore of the river does not give them any rights, either in the bed of the stream or in the waters thereof."

Newell v. Loeb, 77 Wash., 182, at pp. 191, 192, 193, 194.

In Judge Neterer's opinion rendered in this case language is quoted (see Record, p. 36) from the case of *Illinois Central Ry. Co. v. Illinois*, 146 U. S., 387, to the effect that the title of the State to tide lands under navigable waters is one held in trust for the people of the State, "that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants." (Record, p. 36.)

We suppose that it was upon this theory that in the opinion the Court found that the giving of a

permit by appellant and the making of a lease by respondent railroad company to respondent J. F. Duthie & Company for shipyard purposes was not authorized by the statute, though the decree as finally entered seems to have ignored this position.

We submit that for the purposes of this case it is wholly immaterial whether the title of the State of Washington to the waterway area in the East Waterway is held to be by *jus publicum* or by *jus privatum*. This suit is one to quiet the title of the State and its representative, appellant, in the waterway area as against the claims of respondent railroad company that it has a right in the waterway area for access and for the construction of wharves or other structures, and if the State in fact owns the waterway area either by virtue of its sovereignty in trust or by full beneficial title, appellant should in either case, having full jurisdiction of the waterway under the laws of the State of Washington with power to give permits for its use for proper purposes, be held to have the right to maintain this suit to quiet the State's title as against the claims of respondent railroad company. Whether the Port has made an improper use of its trust powers and given an improper permit is in no manner material to the

determination of this cause. If the State's title is in trust for the whole people of the State it is in trust for the protection of the rights of navigation and fishery and not in trust for any private person, whether he be an abutting owner or another,—the trust is for the protection of public rather than private rights.

However, in the case of *Harbor Line Commissioners v. State*, 2 Wash. 530, our Supreme Court said (at page 534):

> "Acting within their sovereign power, as above recognized, the people of this State, in forming a constitution, saw fit to assert the title of the State to the lands in question, and having done so they are the only power that can interfere with such title. But it is said that, while such assertion of title is made in the constitution, it is so made subject to vested rights of the riparian owner to be asserted in the courts. I am of the opinion that this vested right cannot be held to be such as is incident to the riparian owner simply as such, but must be held to apply only to some special right held by such owner by way of improvements made under express or implied license from the representative of the sovereign power. To hold that the former was intended, would practically destroy the title of the State, and would, therefore, be inconsistent with the assertion of such title; while the latter construction will give force to every word, and make the provision in its entirety a consistent one. *When the people say that they assert the State's title, it must be held to mean*

the entire and exclusive title. Of course, the rights of the State, as above stated, are subject to the paramount right of the United States to regulate commerce and navigation, as to which I shall say a word later on."

(The *italics* are ours.)

And in the case of *Eisenback v. Hatfield*, 2 Wash. 236, 240, the Court says:

> "In this State the common law is our rule of decision in the settlement of questions requiring judicial determination, when not specially provided for by statute. And it seems to be generally conceded that at common law the title to the soil under tide water was vested in the crown. The ownership of the soil was regarded as a *jus privatum*, and could be conveyed to individuals, subject only to the public right of navigation and fishing, which public right was under the absolute control of parliament. In this country we have the highest authority in support of the doctrine that the State has succeeded to all the rights of both king and parliament, and hence is the absolute owner of all the navigable waters and the soil under them within its territorial limits."

The trial Court held that no harbor area had been created in the East Waterway and we are not contesting that position upon this appeal. However, at the time this waterway was created and these tide lands platted and sold to respondents' grantors and at all times since the power of the State to plat harbor lines and areas in the waterway has existed as

will be seen by reference to Section 1 of Article XV of the Constitution hereinbefore quoted. This provision has been held to require the establishment of harbor lines in all harbors.

> *State ex rel Seattle v. Savidge*, 95 Wash. 240, 245, 246.

See also *Puget Mill Co. v. State*, 93 Wash. 128.

And the Supreme Court in the leading case, to which we have referred so many times, *Eisenbach v. Hatfield*, 2 Wash. 236, at page 249, in discussing a case involving tide lands in which no harbor line had been then laid out (and in that respect like the case at bar), says:

> "We think the authorities abundantly show that a riparian proprietor on the shore of the sea, or its arms, has no rights as against the State or its grantees to extend wharves in front of his land below high water mark.
>
> But, if this were not so, we would still be constrained to hold that appellee has no such rights; for the constitution of the State, which is the supreme law of the land, expressly declares that the legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors of the State, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof, upon either side; and, further, that the legislature shall provide gen-

> eral laws for the leasing of the right to build wharves, docks and other structures, upon certain designated areas, or the legislature may provide by general laws for the building and maintaining, upon such area, wharves, docks and other structures. (Const., Art. 15.)"

And it will not be and cannot be contended but that if the State authorities should have heretofore or should in the future determine to lay out harbor lines and plat harbor area within the boundaries of the East Waterway, respondent railroad company would have no access and no right of access to navigable water in the East Waterway.

We submit that this power in the State (and indeed the Constitution seems to make it a duty rather than a power) to lay out harbor areas in the waterway is a very strong argument to indicate that it was not intended that grantees of lands abutting upon the waterway should have as an incident to their ownership any rights in the waterway.

III.

SHORE LAND CASES.

Respondents upon the hearing below relied particularly upon the doctrine laid down by our Supreme Court in certain shore land cases, being the cases of *State v. Sturtevant*, 76 Wash. 158. *Van*

Siclen v. Muir, 46 Wash. 38, and *Muir v. Johnson,* 49 Wash. 66, and Judge Neterer in his decision in this case finding certain rights to exist in the waterway in favor of the respondent railroad company, seemed to base his decision upon the *Sturtevant* case.

We most respectfully submit that those cases are not applicable to and have no bearing upon the question involved in this case.

Those cases involved rights of purchasers from the State of shore lands upon fresh water not affected by the ebb and flow of the tide. Shore lands were sold by the State not in lots or platted tracts, but by lineal front chain without the specification of an outer boundary.

The case of *State v. Sturtevant* arose out of a contest between the State and certain purchasers of shore lands upon Lake Washington. In connection with the construction of the Government Canal between the tide waters of Puget Sound and Lake Washington, which is a body of fresh water, the level of the waters of Lake Washington was lowered many feet, thereby increasing the width of shore land upon the borders of the lake. The case of *State v. Sturtevant* was brought by the State to determine

the right, as between the State and owners of shore lands who had purchased them prior to the lowering of the lake, to the strip of shore land so exposed by such lowering. It was held in that case that the purchasers of shore lands, having purchased them without an outer boundary, took to the line of navigability, and, basing its dictum upon the case of *Miller v. Mendenhall*, 43 Minn. 95, said (though the point was not involved in the case) that "The right of a riparian proprietor or a shore owner to improve up to the line of navigation and to erect docks and piers, though sometimes denied, is now well settled." It must be remembered, however, that the case of *Miller v. Mendenhall* involved rights upon a navigable fresh water river and that the Court in deciding the case was passing upon rights of a purchaser of shore lands without an outer boundary and upon fresh water and not upon any question involved relating to tide lands or lands bordering upon tide waters.

The Court reaffirmed the doctrine of *Eisenbach v. Hatfield* and quoted the language of that opinion that "the owner of uplands bordering on navigable waters as such had no riparian or littoral rights in such waters as would enable him to maintain an in-

junction from interference therewith." (See p. 164.) The Court also called attention to the fact that "The law provides that shore lands of the second class shall be sold not by tracts or lots and blocks, but by the lineal chain." (See p. 165.)

The Court also says, on page 163:

> "This Court has, with the exception of the case of *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, uniformly held that there is no riparian right in the owner of lands bordering on the navigable waters of the State,"

supporting the statement by the citation of a long line of decisions of our State Supreme Court.

The Court, on the same page, page 163 of the decision, after quoting the constitutional provision, says:

> "This declaration destroyed all riparian right in tide and shore lands, and affirmed the right of the State to absolutely control and dispose of these lands in any way or to whomsoever the legislature might ordain."

On page 172 of the opinion the Court says:

> "The Attorney General relies upon the case of *Pearl Oyster Co. v. Hueston*, 51 Wash. 533, 107 Pac. 349, 832, 135 Am. St. 1007, as decisive of this case and of the proposition that the title of shore lands will not be extended beyond mean low water. Respondents insist that that case is a mispronouncement of the law. We cannot

agree with either side. The confusion of counsel comes from the failure to mark a difference in definition. Tide lands are defined as "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except etc.;" whereas, shore lands are "lands . . . . below the line of ordinary high water and not subject to tidal flow." Rem. & Bal. Code, Sec. 6641, paragraphs 2 and 3. The words "mean low tide" must have been used advisedly. When the legislature thus limited the outer boundary of tide lands and made no attempt to limit the water boundary of shore lands, it follows, under primary rules of construction, that the purchaser of shore lands of the second class takes the littoral and riparian right in and appurtenant to his land under the general rules of law as construed by the courts and accepted by the people for hundreds of years. 'The riparian owner is . . . . entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream. *Farnham*, Waters and Water Rights, Sec. 62.' A possible reason for limiting the definition of tide lands to the line of mean low tide—indeed, it is most probable—was to protect the State's ownership of oyster lands, for it is well known that oyster land is generally to be found below the line of mean low tide."

We call very special attention to the fact that the Court in the quotation above recognized the difference in the policy of the State in the sale of its tide lands and its shore lands, and while this decision

in its reasoning (though not upon the facts involved, for riparian or wharfage rights were not involved but only the title to a strip of shore land uncovered by the lowering of the lake) sustains a claim to riparian rights in favor of an owner of shore lands abutting upon fresh water purchased without an outer boundary line, it does not in any manner sustain the claim to such riparian rights as appurtenant to tide land, but denies their existence, the doctrine of *Eisenbach v. Hatfield* remaining in full force as to such lands and being approved in the *Sturtevant* case.

The *Sturtevant* case involved nothing but the question of the outer boundary of shore lands bought from the State. The question involved was not one of riparian rights appurtenant to land held in ownership, but the outer boundary of the ownership. There is no question in the case at bar as to the outer boundary of respondent railroad company's title. Respondent will not contend that it has title beyond the line of the waterway, which was the outer boundary of the lots which it bought from the State. Respondent is claiming that it has appurtenant to this land held in private ownership certain riparian rights extending beyond its outer boundary. In the *Sturtevant* case the sole question was as to where

the outer boundary of the private title was located.

The case of *Van Siclen v. Muir,* 46 Wash. 38, and *Muir v. Johnson,* 49 Wash. 66, were cases involving the rights of shore owners on Lake Washington prior to the purchase of the shore lands and denying riparian rights to them. It is true that in the case of *Muir v. Johnson* the Court, while holding that the plaintiff was not entitled to any relief and had no riparian rights as owner of the upland, intimated that riparian rights on Lake Washington were appurtenant to the shore lands which belonged to the State, the Court referring to the case of *Eisenbach v. Hatfield.* That question, however, was foreign to the case. No case can be found in the decisions of Washington courts sustaining riparian rights as incident either to upland or to granted shore or tide lands.

And when it is remembered that the State of Washington by its Constitution declares its ownership of the beds and shores of all navigable waters, that the property claimed by respondent railroad company is a certain portion of such State owned tide lands, definitely described in the grant, and that the bed and shore of East Waterway are another portion, it seems impossible that the State intended

by the grant to respondents' grantors to convey anything in the bed and shores of the waterway which under the decisions of the State were absolutely owned by the State.

In the decision of this case it should be remembered that the Constitution, statutes and Court decisions of the State of Washington all proceed upon the theory of the absolute ownership of the tide lands by the State, and there is no case decided sustaining any riparian or wharfage rights or rights of access in the owner of land bordering upon tide water. If such rights should be sustained in this case in favor of the respondent railroad company, it would be the laying down of a new doctrine in favor of tide land owners. Loose expressions of State judges in deciding questions wholly relating to rights of shore land owners who purchased without a boundary upon the water side should not be taken as indicating an intention by the State of Washington in the sale of its tide lands to grant riparian or wharfage rights, especially in view of the fact that even in those shore land cases the Court has called attention to the distinction between grants of lands bordering upon tide water and lands bordering upon the shores of fresh waters, and the differ-

ence between the policy of the State in dealing with them respectively.

It is also to be noted, by reference to the statutes hereinbefore quoted with reference to waterways and their improvement, that at the time of purchase by the respondent railroad company the waterway was not a waterway in fact, it never having been excavated, and when it should be excavated, and to what width and depth was left wholly to the discretion of the State officers; that to the City of Seattle first and afterwards to the Port was committed, as indicated elsewhere in this brief, full power of changing the channel or course of the waterway and regulating and controlling its use and the construction and maintenance of wharves and structures therein, and that there is not a syllable in any State statute which intimates or suggests any riparian or wharfage rights as having been intended to be conferred in tide waters by the fact that the State sold lots abutting thereon by specific boundaries.

IV.

DECLARATION IN WATERWAY ACT THAT THE WATERWAY SHOULD BE FOREVER RESERVED FROM SALE OR LEASE.

Upon the trial below respondent railroad company relied strongly upon the language in the Waterway Act, that waterways created thereunder should be forever reserved from sale or lease as public ways for water crafts. We submit that the declaration is of no force as affecting the grant by the State to respondents' predecessors in title.

In the first place, if the language is to be construed as applying to the whole width of the waterway, it must be held invalid as attempting to prevent the laying out of harbor lines and areas in the waterway as required by Section 1 of Article XV of the Constitution hereinbefore quoted and as contrary to Section 2 of Article XV of the Constitution providing that:

> "The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article." * * * *
>
> 1 Remington & Ballinger's Code, p. 111.

The Waterway Act, we submit, therefore, must be construed simply as creating a waterway which formed a connecting link in or part of the other tidal navigable waters of the State. It being a part of the harbor of a city of the first class, it was subject to control, modification and change at the instance of the State in the interests of the public, the same as all of its other navigable waters, and it has been so treated by the State at all times. The Legislature of the State of Washington at the same session when the original Waterway Act was passed conferred upon the City of Seattle, as a city of the first class, the power:

> "To deepen, widen, dock, cover, wall, alter or change the channels of waterways and courses, and to provide for the construction and maintenance of all such works as may be required for the accommodation of commerce, including canals, slips, public landing places, wharves, docks, and levees, and to control and regulate the use thereof."
>
> Laws of 1889-1890, pp. 221 and 222, subdivision twenty-sixth.

And these powers were thereafter, as has been heretofore shown, transferred in 1911 to the appellant, Port of Seattle.

It would be strange indeed if the State should

be held by the language of the Waterway Act to have abdicated in favor of its grantees of abutting tide lands its right to deal with its public waterway as in the interests of the public for the purposes of navigation and commerce it may from time to time deem best.

If the abutting owners on the waterway have a permanent vested right to access across the waterway area and do not themselves construct wharves to act as the fingers of commerce the purposes and the usefulness of the waterway would be largely destroyed. If the position contended for by respondent and sustained by the trial Court below should be affirmed here the result would be that while as to all natural tide water streams, like the Duwamish river, the State can without compensation to abutting owners fill up the stream and remove the navigable water a half-mile from the property of the abutters (as was decided in the case of *Newell v. Loeb and Hill v. Newell* above cited) it has no power to deal in like manner, or at all, with the East Waterway simply because it is an artificial rather than a natural waterway. We submit that the declaration in the Waterway Act that the waterway should be a public way for water crafts was inserted for the pre-

servation of the waterway for purposes of navigation and was not intended to confer private rights in any private owner of lands. We submit, further, that the Constitutional provision requiring the location of harbor lines and areas within the waterway is itself conclusive evidence that no riparian rights were intended to be created in abutting owners, as such rights even if created would be forthwith destroyed whenever the Legislature carries out the Constitutional requirement for the establishment of harbor areas and the leasing of the same for the construction of wharves.

The fact is that the Legislature at its session in 1890 had under consideration two plans, one for the Establishment of Waterways through State tidelands, and the other the platting and sale of the tidelands not included in waterways. It passed the two acts of that year we have printed in this brief. In one it provided for the platting and sale of the tidelands, and in the other the platting by a different State agency of the waterway, and to make it clear that the act for platting and sale of the tidelands did not include the tidelands in the waterway those lands were expressly reserved from sale and lease. But the declaration of the State's policy as to the

bed of the State's waterway neither conferred an interest therein in purchasers of tidelands, nor lessened the power of the Legislature to change the State's policy as to the waterway in the interest of the public by providing for making the waterway useful by the construction of wharves and aids to commerce and navigation and the passage of regulatory measures like chapter 168 of the Laws of 1913.

V.

Respondent railroad company is here claiming that it has certain riparian rights and that those rights are not created by any express legislation or express grant. If such rights exist they are implied rather than expressly granted. We have seen that the rule is against such an implication in State grants. We call attention also to the fact that in this State, as quite generally, the right to wharf out where conferred by statute is until exercised a mere revocable license and creates no vested right.

Eisenbach v. Hatfield, 2 Wash. 236, 250.

Shively v. Bowlby, 152 U. S. 1, 13, 14 Sup. Ct. Rep. 548.

CONCLUSION.

We most respectfully submit:

1. That the decree of the trial Court should be reversed and the case remanded to the State Court.

2. If our prayer to have the case remanded to the State Court is not granted, then that the decree of the trial Court be reversed and that Court directed to enter a decree quieting the title of the State of Washington and the appellant, as its representative, to the waterway area described in the complaint as against the respondents, and that respondents be decreed to have no interest therein, and that Chapter 168 of the Laws of Washington of 1913 is a valid exercise of the sovereign power of the State of Washington.

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